STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY, SS. SUPERIOR COURT

Carol Allen and Gary Allen

v.

Dover Co-Recreational Softball League,
Joseph Ferland, President, et al.

Docket No. 01-C-102

ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiff and her husband file this lawsuit seeking damages for injuries the plaintiff sustained when she was hit in the head with a softball during a slow-pitch softball tournament on September 13, 1998. At the time, the plaintiff was a member of the Dover Co-Recreational Softball League. The plaintiff became injured after a male shortstop allegedly negligently threw the ball while she was running to first base. The defendants move to dismiss all counts on several grounds, including a claim that the defendants owed the plaintiff no duty of care. For the reasons stated in this order, the court grants the motion to dismiss as to all counts.

The plaintiffs claim that defendants Daniel's Sports Bar & Grille, Dover Co-Recreational Softball League and American Softball Association of America, Inc. ("ASA"), co-sponsors of the tournament, were negligent in that they breached a duty of care by

conducting the softball game "without utilizing all reasonable safety precautions including but not limited to recommending, requiring or providing batting helmets for the players, using less dangerous softballs, and maintaining proper male/female ratios." (Counts I and II). The plaintiffs also claim that ASA breached its duty to "warn advise, inform and instruct its members regarding the risk of injury to participants in co-ed softball games." (Count II).

In count III, the plaintiffs claim that defendant Martel-Roberge American Legion Post 47, owner of the field, was negligent in that it breached its duty to "require that softball games played on its field were played pursuant to rules and in a manner which minimized the risk of injury to participants."

In Count IV, the plaintiffs claim that defendant Thompson Imports, a participating team, "is vicariously liable for the negligence of its shortstop in errantly throwing the softball." (Count IV).

Finally, in Count V, the plaintiffs claim that defendant, Bollinger Fowler Company, who provides insurance for the co-defendants, breached its duty "to warn, advise, inform and instruct its insureds regarding the risk of injury to participants in co-ed softball games and the manner in which such risks could be minimized."

The court assumes as true the following allegations contained in the plaintiffs' pleadings. On September 13, 1998, the

plaintiff, Carol Allen, was playing in a co-ed softball tournament sponsored by the Dover Co-Recreational Softball League. The plaintiff had participated in games sponsored by the league throughout the summer of 1998.

Before the event in question, the sponsors of the game changed the rules to permit female players to hit a smaller softball. Such a change allowed the women to hit the ball farther and compete more equally with the men. The men were required to hit a standard-sized softball. Since the game was slow-pitch, which required the ball to be lofted in the air when pitched, the rules did not require the players to wear helmets. Nothing in the rules, however, prohibited a player from doing so. Finally, the rules required an equal ratio of male to female players. Nevertheless, on September 13, 1998, there were more male than female players.

On her first attempt at bat, the plaintiff hit the ball into the infield. As she ran toward first base, a male shortstop on the opposing team threw the ball "errantly" and it struck her in the head causing severe injuries. At the time, the plaintiff was not wearing a helmet.

The defendants move to dismiss all counts arguing that they owe the plaintiff no duty of care because individuals who participate in recreational or sports activities assume the ordinary risks attendant to those activities. Since being hit with a ball is a foreseeable consequence of the plaintiff's

voluntary participation in the sporting event, the defendants argue the plaintiff cannot recover for the resulting injury. The plaintiff objects and argues that since the New Hampshire Supreme Court has rejected the doctrine of primary assumption of the risk, as a common law defense, the standard of care the defendants owed to the plaintiff was one of ordinary prudence.

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, the court must determine "whether the plaintiff[s'] allegations are reasonably susceptible of a construction that would permit recovery." Hacking v. Town of Belmont, 143 N.H. 546, 549 (1999). In addition, the court "assume[s] the truth of the plaintiff[s'] well pleaded allegations of fact and construe[s] all reasonable inferences from them most favorably to the plaintiffs." Id. (citations omitted).

Count IV, Thomspon Imports

The court first considers the plaintiffs' claim of vicarious liability against Thompson Imports. In order to determine whether the plaintiffs have stated a cause of action, the court must consider what duty of care the shortstop who threw the ball owed the plaintiff. Though the New Hampshire Supreme Court has yet to address the issue, a majority of jurisdictions considering the duty of care owed between co-participants to avoid injury in recreational sporting activities have concluded that "to constitute a tort, conduct must exceed the level of ordinary negligence." Crawn v. Campo, 643 A.2d 600, 603 (N.J. 1994).

Specifically, those courts have determined that "the appropriate duty players owe to one another is not to engage in conduct that is reckless or intentional." Id. Such a heightened standard promotes the vigorous participation in athletic activities and avoids the flood of litigation that would result if mere negligence were the standard. Id. at 604. See also Ritchie-Gamster v. City of Berkley, 597 N.W.2d 517, 523 (Mich. 1999) ("The heightened recklessness standard recognizes a common-sense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.") (citations omitted). Courts adopting a recklessness standard in cases involving recreational sports "have recognized different reasons for departing from the ordinary negligence standard." Ritchie-Gamster, at 522. Some have concluded that a participant assumes the risk of injury when engaging in recreational sports and cannot recover for an injury absent evidence of reckless or intentional conduct. Id. "In states where assumption of the risk has been abolished, . . . courts have held that a participant 'consents' to conduct normally associated with the activity." Id. (citations omitted.) "No matter what terms are used, the basic premise is the same: When people engage in a recreational activity, they have voluntarily subjected themselves to certain of those risks inherent in the activity. When one of those risks results in injury, the participant has no ground for complaint."

Id. at 524.

A decision from the New York Court of Appeals is particularly instructive here because, like New Hampshire, New York does not recognize the doctrine of primary assumption of the risk. In Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986), the court instead, analyzed the proper duty of care pursuant to a comprehensive comparative fault statute. In Turcotte, the plaintiff was a professional jockey who was injured during a race when his horse clipped the heels of the horse in front of him. The plaintiff sued another rider arguing he violated the rules of the race by engaging in "foul riding." The plaintiff also sued the owner/operator of the track for negligence. In determining the appropriate standard of care owed to an athlete injured during a sporting event, the court stated as follows:

> [T]he determination of the existence of a duty and the concomitant scope of that duty involve a consideration not only of the wrongfulness of the defendant's action or inaction, [but also of] plaintiff's reasonable expectations of the care owed to him by others.
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> Traditionally, the participant's conduct was conveniently analyzed in terms of the defensive doctrine of assumption of risk. With the enactment of the comparative negligence statute, however, assumption of the risk is no longer an absolute defense. . . . Thus, it has become necessary, and quite proper, when measuring a defendant's duty to a plaintiff to consider the risks assumed by the plaintiff. . . . The shift in analysis is proper because the "doctrine [of assumption of risk] deserves no separate existence . . . and is simply a confusing way of stating certain no-duty rules." . . . Accordingly, the analysis of care owed to plaintiff in the professional sporting event by a co-participant and by the proprietor of the facility in which it takes place must be evaluated by considering

> the risks plaintiff assumed when he decided to participate in the event and how those assumed risks qualified defendants' duty to him.
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> The risk assumed . . . "means that the plaintiff, in advance, has given his . . . consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. The situation is then the same as where the plaintiff consents to the infliction of what would otherwise be an intentional tort, except that the consent is to run the risk of unintended injury . . . The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence."
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> Defendant's duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. . . . Plaintiff's "consent" is . . . implied from the act of the electing to participate in the activity. . . . When thus analyzed and applied, assumption of risk is not an absolute defense but a measure of the defendant's duty of care and thus survives the enactment of the comparative fault statute.

Turcotte, at 967, 968 (citations omitted).

In applying this reasoning to the facts before it, the court in Turcotte specifically ruled that "participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." Id. at 968. This rule is qualified, however, "to the extent that participants do not consent to acts which are reckless or intentional." Id.

The court finds the cases discussed above persuasive and rules that co-participants in recreational sporting events owe a duty to other participants to refrain from reckless or intentional

conduct. Since the plaintiffs allege that the shortstop threw the ball negligently, Thompson Imports cannot be held vicariously liable under the circumstances of this case.

The Remaining Defendants

The plaintiffs claim the remaining defendants were negligent under various theories for the failure to require participants to use helmets, the failure to maintain an equal number of male and female players and for changing the size of the ball when female players were batting. Specifically, the plaintiffs argue that even if a recklessness standard applies in this case, it should be limited in application to co-participants and not to organizers or sponsors of the event.

The defendants cite several cases in support of their position that the recklessness standard should also apply to sponsors and organizers. See e.g. Goodwin v. Youth Sports Association Purchasing, 2001 WL 128442 at 4 (Mass. Super.)("There is no reason to suppose that players who voluntarily associate themselves with a non-professional, sporting competition . . . have an expectation that the organizers or sponsors owe them any greater duty than their fellow players.")

While Goodwin supports the defendants' position, this court finds more persuasive the analogy contained in Turcotte. There, the court assessed the defendant-sponsor's duty in light of the scope of the plaintiff's consent in participating in the sporting activity. "[The sponsor/owner's] duty to plaintiff is similarly

measured by [the plaintiff's] position and purpose for being on the track . . . and the risks he accepted by being there." Id. at 970. After considering, among other things, "the nature of professional horseracing and the facilities used for it [and] the playing conditions under which horse racing is carried out," the court concluded that the plaintiff had consented that the duty of care the owner of the racetrack owed to him was no more than a duty to avoid reckless or intentionally harmful conduct. Id.

A review of New Hampshire cases suggests that the Supreme Court would adopt the court's conclusion in the present case. See Hacking, 143 N.H. at 553 (court recognized that "[w]hile one participating in a sport might 'consent[] to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,' . . . one does not ordinarily assume an 'unreasonably increased or concealed' risk) (citations omitted). See also Nutbrown v. Mount Cranmore, Inc., 140 N.H. 675 (1996) ("The questions certified by the district court do not require us to decide whether this court's rejection of the doctrine of primary assumption of the risk as a common law defense has any continuing validity; we therefore leave this issue for another day.")

In applying the analysis explained in this order, the court concludes that the plaintiff consented that the duty of care the sponsors and owners owed her was a duty to refrain from reckless or intentional conduct. There can be no question that when the

plaintiff agreed to participate in the softball league, she understood that one of the risks inherent in participation was the possibility of being hit in the head with a ball during play. Indeed, she indicates in her affidavit that several players during the previous season were injured in precisely the same manner as she was in 1998. Plf. Aff. par. 7.

In addition, at the time of her injury, the plaintiff knew the co-ed leagues would use a smaller ball when women were at bat "to allow the women to hit the ball farther than . . . with the standard softball." Id. The size of the ball was apparent at the time of play.

Finally, regardless of whether the rules required an equal ratio of male to female players, the plaintiff was obviously present at the game and knew that more male than female players were playing at the time she hit the ball. "The rules of the sport . . . do not necessarily limit the scope of the [plaintiff's] consent." Turcotte, at 969. Where, as here, the male/female ratios were obvious at the time of play, the plaintiff consented to the unequal ratio. See id. at 970 (where defendant's violation of the rules of horseracing was not flagrant, was "unrelated to the normal method of playing the game" was not "done without any competitive purpose," court held plaintiff consented to the inherent risks involved in the sport even though defendant violated rules).

The court concludes that there was nothing about the

defendants' conduct which changed the obvious and inherent risk that the plaintiff could get hit by a ball during the softball game and that she could sustain serious injury if she failed to wear a helmet. Accordingly, the defendants' motion to dismiss all counts of the writ is granted.

SO ORDERED.

Date: July 10, 2001

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Tina L. Nadeau
Presiding Justice